CERTIFICATE OF COUNSEL.

I hereby certify that I am Attorney for the Petitioner in the above entitled case, and that in my judgment the foregoing Petition is well founded in law and fact, and that said Petition is not interposed for delay.

Dated, San Francisco, California,
September 23, 1936.

HERMAN WEINBERGER,
*Attorney for Petitioner.*

# In the Supreme Court
OF THE
# United States

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OCTOBER TERM, 1936

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No.

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WILHELMINA SUMI,
*Petitioner,*

vs.

ALSIE M. YOUNG,
*Respondent.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### A.

### OPINION OF THE COURT BELOW.

The Opinion of the Circuit Court of Appeals for the Ninth Circuit is set forth in the Record, pages 129 to 133, and in the Appendix, pages i to iv. It is reported in 83 Fed. (2d) 752.

B.

**JURISDICTION.**

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, ch. 229, Section 1, 43 Stat. 936.

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C.

**STATEMENT OF THE CASE.**

This has been fully covered under "SUMMARY STATEMENT OF THE MATTER INVOLVED" in the Petition for Writ of Certiorari herein, and in the interest of brevity that statement is not repeated here.

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D.

**SPECIFICATION OF ERRORS TO BE URGED.**

The following are assigned as errors in connection with the judgment of the Circuit Court of Appeals (R. 131) (83 Fed. (2d) 752):

1. The Circuit Court of Appeals erred in holding that Section 128 of the Judicial Code exclusively confers jurisdiction on it in connection with judgments entered in the District Court of Alaska.

2. The Circuit Court of Appeals erred in stating that the appellate jurisdiction of the District Court of Alaska with reference to judgments of the Probate Courts of Alaska is to "review" these judgments and in failing to state that the jurisdiction is more com-

prehensive than mere review and extends to the trial of such cases *de novo*.

3. The Circuit Court of Appeals erred in holding that the instant case is not one wherein a statute of the United States is involved.

4. The Circuit Court of Appeals erred in holding that Section 943 of the Act of June 6, 1900 c. 786, 31 Stat. 480 (Compiled Laws of Alaska 1933, Sec. 4574) does not confer appellate jurisdiction on it in the instant case, although the Section by its very terms purports to do so.

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## E.

### SUMMARY OF ARGUMENT.

The Circuit Court of Appeals for the Ninth Circuit does not obtain exclusively from Section 128 of the Judicial Code its appellate jurisdiction as to judgments entered in the District Court of Alaska. This is shown to be true historically, by reference to the dates of various enactments, including the Act of June 6, 1900 (31 Stat. 321), being the Code of Civil Procedure of Alaska, as enacted by Congress. This Code contained a complete system of appellate procedure. When the Judicial Code was enacted March 3, 1911, many sections of the Code of Civil Procedure of Alaska were amended and, as amended, were carried into the Judicial Code. But other sections, particularly those covering appeals in special proceedings, such as Writs of Review, Mandamus, Contempt and Probate Cases, were not amended nor carried into the

Judicial Code, nor were they repealed. The appeal in the instant case is authorized by the last designated section, to-wit: "Appeals in Probate Cases", Section 943 of the Act of June 6, 1900, now Section 4574, Compiled Laws of Alaska 1933. This Section, since its enactment, has been and now is in full force and effect; is an Act of Congress of equal dignity with the Judicial Code, and supplements the jurisdiction of the Circuit Court of Appeals as provided for in the Judicial Code. It provides for appeals "in the manner provided for appeals from judgments in the District Court". The Circuit Court of Appeals overlooked entirely the words "in the manner", and held that appealable judgments of the District Court are provided for only in Section 128 of the Judicial Code, thus nullifying the statute and making the District Court of Alaska, the Court of last resort in the instant case.

Not only does the Circuit Court of Appeals have jurisdiction under the specific section of the Code of Civil Procedure of Alaska just mentioned, but it has jurisdiction also under Section 128 of the Judicial Code itself, for the reason that the interpretation and construction of a statute of the United States is involved. The Circuit Court of Appeals did not always have this jurisdiction. It was acquired by the amendment of February 13, 1925. The Code of Civil Procedure of Alaska is a statute of the United States. A consideration of the instant case on its merits requires the construction and interpretation of several sections of the Code relating to Guardianship, and where the interpretation and construction of Sections of a stat-

ute of the United States are called into the question, the Circuit Court of Appeals has jurisdiction.

Therefore, the Court was in error in granting the Motion to Dismiss the Appeal in the instant case, and its judgment should be reversed.

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## F.

### ARGUMENT.

**I. SECTION 128 OF THE JUDICIAL CODE* DOES NOT EXCLUSIVELY CONFER APPELLATE JURISDICTION ON THE CIRCUIT COURT OF APPEALS AS TO JUDGMENTS ENTERED IN THE DISTRICT COURT OF ALASKA.**

**(a) Historically.**

*May 17, 1884.* Alaska was first constituted a civil and judicial district by act of Congress. (23 Stat. L. chap. 53.) District Courts were established. The general laws of the State of Oregon then in force were declared to be the laws of the District. Writs of Error and Appeal were provided for to the Circuit Court for the District of Oregon and to the Supreme Court of the United States.

*March 3, 1891.* The Circuit Court of Appeals was created by the Act of this date (26 Stat. 826) with limited appellate jurisdiction to review by Appeal or Writ of Error the final decisions in the District Courts and Circuit Courts. No specific mention was made of the District of Alaska.

*June 6, 1900.* Congress enacted the Code of Civil Procedure of Alaska (31 Stat. 321) containing sec-

*Section 128 of the Judicial Code, as originally enacted; as amended February 13, 1925; May 20, 1926; April 11, 1928, and May 31, 1935, will be found in the Appendix, pages iv to viii.

tions constituting complete appellate procedure. The Code was mainly copied from the Statutes of Oregon, then in effect, but not entirely so. (Introduction to Carter's Annotated Alaska Code.) Provision was made for Appeals and Writs of Error from the District Courts of Alaska to the United States Supreme Court in certain specified cases, and to the Circuit Court of Appeals for the Ninth Circuit in all other cases where the amount involved or the value of the subject matter exceeded five hundred dollars. (Secs. 504 to 508, Carter's Codes, 31 Stat. 414.) And provision was also made for review by the Circuit Court of Appeals in certain special proceedings, including Writs of Review (Sec. 551 Carter's Codes, 31 Stat. 421), Mandamus (Sec. 565, Carter's Codes, 31 Stat. 422), Habeas Corpus (Sec. 608, Carter's Codes, 31 Stat. 429), Contempt (Sec. 623, Carter's Codes, 31 Stat. 431), *Appeals in Probate Cases.** (Sec. 943, Carter's Codes, 31 Stat. 480.)

*March 3, 1911.* Congress enacted the Judicial Code. (Stat. 1910-1911, p. 1087.) Certain sections of the Alaska Code governing Appeals and Writs of Error were amended and carried into the Judicial Code, as amended. Section 504 of the Alaska Code of Civil Procedure (Carter's Code, Sec. 504, 31 Stat. 414) became Section 247 of the Judicial Code. (36 Stat. L. 1158.) Section 505 of the Alaska Code of Civil Procedure (Carter's Codes, Sec. 505, 31 Stat. 414) was amended, and, as amended, carried into the Judicial Code as Section 134. (36 Stat. L. 1134.) (Both of these Sections, 247 and 134, were repealed by the

*All italics ours.

amendment of the Judicial Code by the Act of February 13, 1925, 43 Stat. 936.) The other appellate provisions in the Alaska Code, including those governing the *special proceedings,* enumerated above, were not amended nor carried into the Judicial Code, nor were they repealed. *They remained in full force and effect as a part of the Code of Civil Procedure of Alaska.* No specific mention was made of Alaska in Section 128 of the Judicial Code where the general jurisdictional powers of the Circuit Court of Appeals are found.

The "Repealing Provisions" of the Judicial Code are set forth in Section 297 thereof. (Stat. 1910-1911, p. 1168, chap. 14.) These are lengthy and specific, but they do not, either directly or indirectly, repeal any part of the previous Act of Congress which constitutes the Alaska Code of Civil Procedure (31 Stat. 321) and as stated before, they do not repeal any of the Sections of that Code covering the *special proceedings* above enumerated.

*February 13, 1925.* Congress amended the Judicial Code. (43 Stat. 936.) It amended Section 128 and reenacted it as amended.*

An important addition to the jurisdiction of the Circuit Court of Appeals was made by this amendment. Whereas theretofore the Supreme Court had been vested with appellate jurisdiction to review the final judgments of the District Court of Alaska

> "in all cases which involve the construction or application of the Constitution of the United

*Appendix, p. v.

> States, or in which the constitutionality of any law of the United States * * * is drawn in question"

by this amendment, the Circuit Court of Appeals was given appellate jurisdiction to review final decisions in the District Court of Alaska

> "in all cases, civil and criminal, wherein the Constitution or *a statute* or treaty of the United States * * * is involved."

By the Act of February 13, 1925, various statutes and parts of statutes again were repealed (43 Stat. 941), and although portions of the Hawaiian Act, of the Canal Zone Act, and others were specifically mentioned and repealed, again *there was no mention, and no repeal of those sections of the Alaska Code dealing with Mandamus, Contempt, Writs of Review or Appeals in Probate Cases.* The subject of Habeas Corpus was covered in Section 128 of the Judicial Code, but none of the others was mentioned and none of the other sections is repealed expressly or by implication.

**(b) The Judicial Code does not purport to contain all of the statutory law.**

This was recognized and stated by this Court in *Street & Smith v. Atlas Mfg. Co.*, 231 U. S. 348, wherein the Court said:

> "*The Code does not purport to embody all the law* upon the subjects to which it relates. It contains some new provisions and some that are modifications of old ones; but much of it is merely a reenactment of prior laws with appropriate re-

gard to their proper classification and orderly arrangement."

That Section 128 of the Judicial Code is not all-inclusive of the jurisdiction of the Circuit Court of Appeals and does not exclusively confer jurisdiction on that Court, is evident from the jurisdiction given the Court (exclusively) to review: (a) Decisions of the Board of Tax Appeals (44 Stat. 110); (b) Orders of the Federal Trade Commission under Section 9 of the Securities Act of 1933; and (c) Awards of the Commissioners in Condemnation Proceedings under Section 24 of the Tennessee Valley Authority Act.

This additional jurisdiction was not conferred by amending Section 128 of the Judicial Code. If this Section exclusively conferred jurisdiction on the Circuit Court of Appeals, it is clear that additional jurisdiction could be added only by amending such Section. There are other laws which supplement the jurisdiction conferred by Section 128.

If Congress had intended that the appellate jurisdiction of the Circuit Court of Appeals with reference to Alaska should be derived exclusively from Section 128, as amended in 1925, it could have used definite and certain language to signify such intention.

Such language manifestly would have repealed by implication previous enactments of Congress covering the same subject matter.

The various Sections of the Alaska Code covering Writs of Review, Mandamus, Contempt and Appeals in Probate cases are such previous enactments.

And yet, in the Opinion in the instant case (Appendix p. i) the Court holds that appeals from judgments of the District Court of Alaska

> "are provided for *only* in the cases specified in Section 128 of the Judicial Code."

Thus, all of the provisions of the Alaska Code with reference to appeal in the various matters hereinbefore mentioned, are at once nullified by the Court.

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**II. THE APPEAL IN THIS CASE IS SPECIFICALLY AUTHORIZED BY SECTION 943 OF THE ACT OF JUNE 6, 1900, c. 786, 31 STAT. 480 (Section 943 Carter's Annotated Codes; Section 1775 Compiled Laws of Alaska 1913; Section 4574 Compiled Laws of Alaska 1933).**

**(a) This Section has never been amended nor repealed.**

Since the enactment of this Section, which is part of the chapter on "Appeal in Probate Cases", its provisions have remained the same, as follows:

> *"Sec. 4574. Proceedings in such cases.* Upon such hearing the District Court or judge thereof shall determine the issues so raised according to the very right of the matter and make such order in the premises as he may see fit, which order shall be entered in a docket to be kept by the clerk of the court for that purpose, properly indexed, and a copy of the same shall be forwarded to the commissioner before whom the exceptions were filed, who shall thereupon proceed in accordance with such order. *Such orders shall be deemed a judgment, subject to appeal in the manner provided for appeals from judgments in the District Court."*

The italicized language is similar to that used in those Sections of the Oregon Code which became a part of the Alaska Code, to-wit:

| Oregon | | Alaska |
|---|---|---|
| Section 611 L. O. L. | Writ of Review | Section 4111 C. L. A. (1933) |
| Section 626 L. O. L. | Mandamus | Section 4128 C. L. A. (1933) |
| Section 669 L. O. L. | Habeas Corpus | Section 4177 C. L. A. (1933) |
| Section 684 L. O. L. | Contempt | Section 4196 C. L. A. (1933) |

In these Sections, the provision with reference to appeal is as follows:

WRITS OF REVIEW.

31 Stat. 421;
Sec. 551 Carter's Codes;
Sec. 1383 C. L. A. 1913;
Sec. 4111 C. L. A. 1933.

"From a judgment of the District Court on review an appeal may be taken *in like manner and with like effect as from a judgment of such District Court in an action.*"

MANDAMUS.

31 Stat. 422;
Sec. 565 Carter's Codes;
Sec. 1397 C. L. A. 1913;
Sec. 4128 C. L. A. 1933.

"From a judgment of the District Court, or judge thereof, refusing to allow a mandamus, or directing a peremptory mandamus, an appeal may be taken *in like manner and with like effect as in an action.*"

HABEAS CORPUS.

31 Stat. 429;
Sec. 608 Carter's Codes;
Sec. 1440 C. L. A. 1913;
Sec. 4177 C. L. A. 1933.

"Any party to a proceeding by habeas corpus, * * * may appeal from the judgment of the District Court * * * *in like manner and with like effect as in an action.*"

CONTEMPT.

31 Stat. 431;
Sec. 623 Carter's Codes;
Sec. 1455 C. L. A. 1913;
Sec. 4196 C. L. A. 1933.

"Either party to a judgment in a proceeding for contempt may appeal therefrom *in like manner and with like effect as from a judgment in an action.*"

The similarity of the language with that used in Section 4574, Appeal in Probate Cases, supra, should be noted:

"Such orders shall be deemed a judgment, subject to appeal *in the manner* provided for appeals from judgments in the District Court."

In its Opinion in the instant case (Appendix, p. i) the Circuit Court of Appeals entirely overlooked the words "in the manner". The Court says:

"Section 943 (C. L. A. 1933 Section 4574) does not, of itself, confer or purport to confer any appellate jurisdiction on this court. It merely provides that orders made by the District Court for Alaska in probate cases shall be deemed judgments, subject to appeal in the manner provided for appeals from other judgments of that court. *Appeals from other judgments of that court are provided for only in the cases specified in Section 128 of the Judicial Code. This is not one of those cases.*"

We submit that the words of Section 4574 C. L. A. 1933, to-wit:

*"shall be deemed a judgment, subject to appeal"*

mean that a judgment "subject to appeal" is an appealable judgment. These words create an appealable judgment and confer the *right* to appeal.

The words:

*"in the manner* provided for appeals from (other) judgments in the District Court"

refer solely to the *manner or mode* of taking and perfecting such an appeal.

The *right* to appeal from certain "other" judgments is specifically given in Section 128 of the Judicial Code, but is not solely given there.

The *right* to appeal from this judgment is specifically given in Section 4574 C. L. A. 1933. These rights are not in conflict—they are complementary.

The *manner or mode* of taking and perfecting an appeal from appealable judgments (not only from those made appealable by Section 128 of the Judicial Code but also from those made appealable by Section 4574 C. L. A. 1933 and other Sections of the Alaska Code) is not provided for in Section 128 of the Judicial Code. The *manner or mode* is set forth in other statutes and in the Rules of Court. The *manner or mode* of taking and perfecting an appeal embraces several steps.

We respectfully urge, therefore, that to say (as does the Opinion of the Circuit Court of Appeals in the

instant case) that an order of the District Court is a judgment

> "subject to appeal in the manner provided for appeals from other judgments of that Court"

and then to say that such judgment cannot be appealed because it is not one of those "other" judgments, is to render meaningless the very words of the statute itself that such judgment is "subject to appeal".

**(b) What is meant by the words "in the manner".**

The ordinarily accepted meaning of the word "manner" is given by Webster as:

> "Mode of action; way of performing or effecting anything; method; style; form or fashion."

Century Dictionary defines it as follows:

> "The way in which an action is performed; method of doing anything; mode of proceeding in any case of situation; mode; way; method."

The words "in the manner" have often received judicial interpretation.

Perhaps the most illuminating statement for our purposes is that made by the Supreme Court of Oregon, in *Turner v. Hendryx,* 169 Pac. 109. This case is particularly instructive and compelling because most of the Code Sections of Alaska were lifted bodily from the Oregon law. This case involved the custody of a child whose father was attempting by habeas corpus proceedings to obtain possession of it from third parties with whom it had been left after the death of its mother. The lower Court refused to grant the writ,

and the question on appeal was whether the Supreme Court of Oregon had the right to review the matter *de novo*. The statute (Section 669 L. O. L.) was as follows:

> "Any party to a proceeding by habeas corpus, * * * may appeal from the judgment of the circuit or county court refusing to allow such writ or any final judgment therein * * * *in like manner* and with like effect as in an action."

In the concurring opinion the Court says:

> "The statute prescribes that a party to a proceeding by habeas corpus may appeal *'in a like manner and with like effect as in an action'*. The word *'manner' means the way of performing anything; the mode in which an act shall be done; the way of doing a thing; the method of procedure.* 25 Cyc. 516; Livesly v. Litchfield, 47 Or. 248, 255, 83 Pac. 142, 114 Am. St. Rep. 920. When the statute says that an appeal in a proceeding by habeas corpus shall be *'in like manner* * * * as in an action', it means that the *mode of appealing is the same as the mode of appealing in an action at law;* and this is only one way of saying that the method of procedure prescribed for appeals in suits in equity cannot be followed when a party appeals from a judgment in a proceeding by habeas corpus. 5 Words and Phrases, 4159, 4161."

> "* * * if in the instant case we try the cause de novo, we do so on evidence which is brought here *in the manner* prescribed for appeals from decrees; and in my opinion this is in direct violation of section 669 L. O. L., which commands that the appeal shall be *'in like manner and with*

*like effect as in an action'*. The statute fixes the mode, and the mode so fixed is the measure of the right to appeal."

We urge, therefore, that Section 4574 C. L. A. 1933, authorizes this appeal to the Circuit Court of Appeals, and must be interpreted as if it read this way:

"An order of the District Court made in a probate case on appeal to it, shall be deemed a judgment. Such judgment is appealable. The manner or mode of taking and perfecting such appeal shall be the same manner or mode which is provided for the taking and perfecting of an appeal from other appealable judgments made and entered in the District Court."

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**III. THE EFFECT OF THE COURT'S DECISION IN THE INSTANT CASE IS TO TAKE AWAY THE RIGHT OF APPEAL IN PROBATE CASES.**

**(a) Congress did not intend the District Court in Alaska, trying a probate case de novo, to be a Court of last resort.**

The District Court of Alaska is more than an Appellate Court in probate matters. In the Opinion in the instant case, in footnote No. 2 (Appendix p. ii) the Circuit Court of Appeals says:

"The District Court for Alaska has *appellate* jurisdiction to *review* orders, decrees and judgments of United States Commissioners exercising probate jurisdiction."

The Sections of the law cited in support of this statement, i. e., Sections 4571-4574 C. L. A. 1933, by their very language, give that Court a more comprehensive

jurisdiction than merely "to review". These Sections provide:

> "Upon the filing of such exceptions the District Judge shall proceed on due notice to *hear and determine* the same *at such time and in such manner* as he shall prescribe by order, and *for that purpose may receive and entertain affidavits and depositions or hear oral evidence.*" (Section 4573 C. L. A. 1933.)
>
> "Upon such hearing the District Court or judge thereof shall determine the issues so raised according to the very right of the matter and make such order in the premises as he may see fit. * * *" (Section 4574 C. L. A. 1933.)

The District Court therefore tries the case *de novo*. The Judge hears oral evidence, determines issues on their merits, and makes "such order in the premises as he may see fit". The Court does more than merely "review" the orders of the Commissioner sitting as a Probate Judge. If there were no appeal from the District Court's decision there would be innumerable and very important, far-reaching probate decisions not subject to any review. No such power is given the District Judge. His judgments are by the very words of the statute *"subject to appeal"*.

This was the opinion of *Judge Wickersham*, when sitting on the District Bench of Alaska. In the case *In re McCarty's Estate*, 3 Alaska 242, at 248, he was considering the question of the proper distribution of an estate. He disagreed with the order of distribution made by the Probate Court (the Commissioner). He said:

> "Chapter 90 of the Code of Civil Procedure of Alaska provides the method for taking appeals from the final orders and judgments of the probate courts to the district court. Section 943 therein provides that upon hearing the appeal the district court or judge thereof 'shall determine the issues so raised according to the very right of the matter and make such order in the premises as he may see fit'. The district court must, of course, determine the issues within the statute and those equitable rules of practice and procedure commonly applicable to such cases. This section further provides that a copy of the judgment of this court shall be forwarded to the probate judge below, who shall thereupon proceed in accordance with such order. *Such order of this court shall be deemed a judgment, from which an appeal will lie to the Circuit Court of Appeals in the manner provided for taking appeals from other judgments of the district court.*"

Here is a direct statement by a Judge whose life and judicial experience paralleled the introduction of the Codes into Alaskan jurisprudence and who, in Alaska, interpreted the very Section of its Code under consideration in the instant case, saying that under the Section "*an appeal will lie to the Circuit Court of Appeals in the manner provided for taking appeals from other judgments of the District Court.*"

## IV. THE CIRCUIT COURT OF APPEALS HAS JURISDICTION NOT ONLY UNDER SECTION 4574 C. L. A. 1933, BUT ALSO UNDER SECTION 128 OF THE JUDICIAL CODE ITSELF, BECAUSE THE INTERPRETATION AND CONSTRUCTION OF A STATUTE OF THE UNITED STATES IS INVOLVED.

The Court in its Opinion (Appendix p. ii) says:

> "This, obviously, is not a case 'wherein the Constitution *or a statute* or treaty of the United States or any authority exercised thereunder is involved' * * * *."

We have pointed out (page 14 this Brief) that by the amendment of February 13, 1925, to Section 128 of the Judicial Code, the Circuit Court of Appeals was invested with appellate jurisdiction to review final decisions in the District Court of Alaska in all cases wherein a statute of the United States is involved.

We contend that a determination of this case on its merits involves the interpretation and application of several Sections of the Alaska Code of Civil Procedure, and that this Code, enacted by Congress as 31 Stat. 321, is a statute of the United States. It is true it was enacted for the government of the Territory of Alaska, but this does not make it any the less a statute of the United States. (*Asiatic Petroleum Co. v. Insular Collector of Customs, U. S. Sup. Co.* [Law. Ed.], Vol. 80, Advance Opinion No. 12, p. 620.) As a matter of fact this Court, itself, has referred to the Alaska Code as being "The Act of Congress." *Waskey v. Chambers*, 224 U. S. 564 at 565.

The case at bar is vitally concerned with the construction and interpretation of five Sections of the

statute, i. e., Sections 4510, 4513, 4514, 4515 and 4516 C. L. A. 1933. For convenience of reference the pertinent parts of these Sections are set forth in the Appendix, pages ix to xii.

This case on its merits involves the validity in Alaska of the appointment of a testamentary guardian of the *persons only* of two minors.

We contend: That under Alaska law there is no authority whatever for the appointment of a guardian of the person only of a minor; that such appointment must be of the person *and* estate; that a guardian who is not empowered to take charge of a minor's estate does not have any right to the care, custody and tuition of such minor; that the lower Courts (Commissioner and District Court) rejected the application of Appellant herein, the grandmother of the minors, to be appointed guardian of the *person and estate* of said minors, and confirmed the appointment of Appellee as guardian of the *person only* (R. 24-25); that the validity of such appointment is directly in issue.

It is our contention that such appointment under the laws of Alaska is void. This question has been properly saved for review in the Circuit Court of Appeals (R. 53 and 59) and is properly before that Court.

The rule that the guardian must be of the *person and estate* of a minor and not merely of the person alone, is not peculiar to Alaska.

As the Court in a New Jersey case, *Tenbrook v. McColm*, 12 N. J. Law 97, said:

> "From a separation of these duties, while very little benefit can be anticipated, many inconveniences and considerable increase of expense must necessarily follow. The policy of our laws is wisely designed to prevent such consequences. From a careful review of the acts of the legislature on this subject * * * *I am satisfied the orphans' courts are not authorized to divide the guardianship of a minor, and commit his property to one and his person to another.*"

Of course, in many jurisdictions the law has been changed, *but it has not been changed in Alaska*, and a reading together of all the Sections with reference to guardianship leads to the inescapable conclusion that there is no warrant or authority under the law of Alaska for the appointment of a guardian by the Commissioner, or by last will and testament, who shall be guardian *only* of the *person* of a minor, and that the confirmation of such attempted appointment is void and of no effect.

A determination of the validity of such order and judgment involves an interpretation and construction of a number of Sections of a statute of the United States. It could never have been intended that the District Court of Alaska should be the Court of last resort in the interpretation and construction of statutes of the United States. In this matter, the District Court of Alaska is to all intents and purposes a *nisi prius* Court trying a probate case *de novo*. Its judg-

ment is subject to review in the Circuit Court of Appeals.

Therefore, jurisdiction is vested in the Circuit Court of Appeals in the instant case not only under the specific provisions of Section 4574 C. L. A. 1933, which in and of itself directly authorizes the appeal, but also under Section 128 of the Judicial Code, which gives that Court appellate jurisdiction where the construction and interpretation of a statute of the United States is involved.

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### V. REVIEW OF CASES CITED BY CIRCUIT COURT OF APPEALS IN SUPPORT OF ITS OPINION.

In support of its conclusion that it has no jurisdiction to review the instant case, the Circuit Court of Appeals in its Opinion cites and relies on four cases, which hold generally that the custody of minors involves no "value in controversy" upon which appellate jurisdiction may be predicated, to-wit: *Barry v. Mercein,* 5 How. 103, 119; *DeKrafft v. Barney,* 2 Black 704, 714; *In re Burrus,* 136 U. S. 586, 595; *Leak v. Leak* (C. C. A. 9), 156 F. 473, 474.

We have no quarrel with this ruling, nor with these decisions. We are not relying on any amount or "value in controversy" in the instant case. We are relying on (a) Section 128, as amended, of the Judicial Code, because a statute of the United States is involved, namely, many Sections of the Code of Civil Procedure of Alaska, 31 Stat. 321; and, (b) a specific

unrepealed Section of the Code of Civil Procedure of Alaska (31 Stat. 480), i. e., Section 4574 C. L. A. 1933, which, by its very terms, authorizes this appeal to the Circuit Court of Appeals.

Furthermore, we desire to point out that when the Circuit Court of Appeals decided the case of *Leak v. Leak* (1907), supra, the Court was not possessed of jurisdiction to hear and determine a case wherein a statute of the United States was involved. That right was given by the amendment to the Judicial Code, Section 128, in 1925.*

Furthermore, a portion of the Opinion of Judge Gilbert in the *Leak* case was purely dictum. The Court was dealing with the question of the care and custody of minors in a divorce action, and said that the Court did not have jurisdiction to hear the appeal because Section 504 of Carter's Codes (the Judicial Code had not yet been enacted) provided for appeals to the Circuit Court of Appeals.

> "in civil causes only in cases where the amount involved, or the value of the subject-matter, exceeds $500."

This, of course, was correct, and upon it the Court rejected jurisdiction of the appeal so far as it concerned the question of the custody of the minors, that is, whether they should go to the one or the other of the divorced parties. But after having decided the case, the Court continued and added:

*Appendix p. v.

> "There is no statutory provision for appeal in cases where the value of the subject-matter of the controversy cannot be measured in money."

In making this statement, the Court overlooked entirely those provisions in the Alaska Code which specifically, and in and of themselves, give the right of appeal without reference to the "value of the subject-matter of the controversy", i. e., Writs of Review, Mandamus, Habeas Corpus, Contempt and Appeals in Probate Cases. Obviously, the Court did not have any of these matters in mind, and its generalized statement, not necessary to the decision of the case it was then considering, cannot be cited as authority in the instant case.

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## VI. SUMMARY.

We contend: That the Circuit Court of Appeals has jurisdiction in the instant case to hear the appeal from the judgment of the District Court of the District of Alaska, (a) under the provisions of Section 128, as amended, of the Judicial Code, for the reason that a statute of the United States (31 Stat. 321), to-wit, the Code of Civil Procedure of Alaska and the interpretation of several sections of that Code, are involved; and (b) under the specific provision of Section 943 of the Act of June 6, 1900, c. 786, 31 Stat. 480. (Section 943 Carter's Annotated Codes; Section 1775 C. L. A. 1913; Section 4574 C. L. A. 1933); that the Circuit Court of Appeals erred in rejecting the jurisdiction; and that

a Writ of Certiorari should be issued so that its judgment herein may be reversed by this Honorable Court.

Dated, San Francisco, California,
September 23, 1936.

Respectfully submitted,
HERMAN WEINBERGER,
*Attorney for Petitioner.*

LOUIS K. PRATT,
*Of Counsel for Petitioner.*

**(Appendix Follows.)**

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## Appendix

*In the United States Circuit Court of Appeals for the Ninth Circuit*

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| WILHELMINA SUMI, Appellant, vs. ALSIE M. YOUNG, Appellee. | No. 7992 May 8, 1936 |

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

Before: WILBUR, GARRECHT and MATHEWS, Circuit Judges.

MATHEWS, Circuit Judge:

Appellee filed with the United States Commissioner[1] for Fairbanks Precinct, Territory of Alaska, a verified petition showing that, by the last will of Mayme Helen Young, deceased, appellee had been appointed as testamentary guardian of her two minor children, and praying for confirmation of his appointment and for letters of guardianship. Appellant, the grandmother of the minors, filed a protest, opposing confirmation of appellee's appointment and praying that she herself be appointed as guardian. The Commissioner, after hearing the matter, overruled appellant's protest, and ordered that appellee's appointment be con-

1. In Alaska, United States Commissioners are ex-officio probate judges. Act of June 6, 1900, c. 786, Section 6, 31 Stat. 323, 48 U. S. C. A. Section 108; Compiled Laws of Alaska, 1933, Section 1109.

firmed and that letters of guardianship be issued to him upon his giving bond in the sum of $3000. On appeal to the District Court,[2] the Commissioner's order was affirmed. From the judgment affirming that order, an appeal has been taken to this Court.

Appellee has moved to dismiss the appeal, on the ground that this Court has no jurisdiction thereof. Section 128 of the Judicial Code, as amended by Section 1 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 28 U. S. C. A. Section 225, provides that this Court shall have appellate jurisdiction to review final decisions in the District Courts for Alaska "in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings"; and shall have appellate and advisory jurisdiction, under Sections 24 and 25 of the Bankruptcy Act, "over all proceedings, controversies, and cases had or brought in the District Courts (for Alaska) under that Act or any of its amendments".

This, obviously, is not a case "wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved", nor a criminal case, nor a habeas corpus proceeding, nor a

2. The District Court for Alaska has appellate jurisdiction to review orders, decrees and judgments of United States Commissioners exercising probate jurisdiction. Act of June 6, 1900, c. 786, Sections 940-943, 31 Stat. 479, 480; Compiled Laws of Alaska, 1933, Sections 4571-4574.

proceeding, controversy or case brought under the Bankruptcy Act or any of its amendments. Nor is it a case "wherein the value in controversy, exclusive of interest and costs, exceeds $1000". There is here no controversy regarding money, property or property rights. The only matter in controversy is the custody of two minor children. The right to such custody cannot be measured in money. There is, therefore, no "value in controversy" on which appellate jurisdiction may be predicated. *Barry v. Mercein*, 5 How. 103, 119; *DeKrafft v. Barney*, 2 Black 704, 714; *In re Burrus*, 136 U. S. 586, 595; *Leak v. Leak* (C. C. A. 9), 156 F. 473, 474. Hence, we conclude, jurisdiction of this appeal is not conferred by Section 128 of the Judicial Code.

Appellant contends that jurisdiction is conferred by Section 943 of the Act of June 6, 1900, c. 786, 31 Stat. 480 (Compiled Laws of Alaska, 1933, Section 4574), which provides that, on appeal from the order of a United States Commissioner exercising probate jurisdiction, the District Court for Alaska or the judge thereof shall determine the issues and "make such order in the premises as he may see fit", and that such order "shall be deemed a judgment, subject to appeal in the manner provided for appeals from judgments in the District Court".

Appellant's contention must be rejected. Section 943 does not, of itself, confer or purport to confer any appellate jurisdiction on this Court. It merely provides that orders made by the District Court for Alaska in probate cases shall be deemed judgments,

subject to appeal in the manner provided for appeals from other judgments of that Court. Appeals from other judgments of that Court are provided for only in the cases specified in Section 128 of the Judicial Code. This is not one of those cases. The motion to dismiss must, therefore, be granted.

Appeal dismissed.

(Endorsed:) Opinion. Filed May 8, 1936. Paul P. O'Brien, Clerk.

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**JUDICIAL CODE, SECTION 128, PRIOR TO AMENDMENT OF FEBRUARY 13, 1925.**

*Sec. 128.* The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

## JUDICIAL CODE, SECTION 128, AS AMENDED FEBRUARY 13, 1925.

*(Judicial Code, section 128, amended.) Appellate jurisdiction—*

(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

*First.* In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

*Second.* In the United States district courts for Hawaii and for Porto Rico in all cases.

*Third.* In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings; and in the district court for the Canal Zone in the cases and mode prescribed in sections 1307, 1324, 1336 and 1341 to 1357 of Title 48.

*Fourth.* In the Supreme Court of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and

costs, exceeds $5000, and in all habeas corpus proceedings.

*Fifth.* In the United States Court for China, in all cases.

(b) *Review of interlocutory orders or decrees of district courts.* The circuit court of appeals shall also have appellate jurisdiction—

First. To review the interlocutory orders or decrees of the district courts which are specified in section 227 of this title.

Second. To review decisions of the district courts sustaining or overruling exceptions to awards in arbitrations, as provided in sections 117 to 121 of Title 15.

(c) *Appellate and supervisory jurisdiction in bankruptcy proceedings.* The circuit courts of appeals shall also have an appellate and supervisory jurisdiction under sections 47 and 48 of Title 11, over all proceedings, controversies, and cases had or brought in the district courts under Title 11, relating to bankruptcy, or any of its amendments, and shall exercise the same in the manner prescribed in those sections; and the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit in this regard shall cover the courts of bankruptcy in Alaska and Hawaii, and that of the Circuit Court of Appeals for the First Circuit shall cover the court of bankruptcy in Porto Rico.

(d) *Circuits in which reviews shall be had.* The review under this section shall be in the following circuit courts of appeals: The decisions of a district court of the United States within a State in the circuit

court of appeals for the circuit embracing such State; those of the District Court of Alaska or any division thereof, the United States district court, and the Supreme Court of Hawaii, and the United States Court for China, in the Circuit Court of Appeals for the Ninth Circuit; those of the United States district court and the Supreme Court of Porto Rico in the Circuit Court of Appeals for the First Circuit; those of the District Court of the Virgin Islands in the Circuit Court of Appeals for the Third Circuit; and those of the District Court of the Canal Zone in the Circuit Court of Appeals for the Fifth Circuit.

(e) *Jurisdiction over Federal Trade Commission, Interstate Commerce Commission, and Federal Reserve Board.* The circuit courts of appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 45 of Title 15; and orders of the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, as provided in section 21 of Title 15. (Mar. 3, 1891, c. 517, section 6, 26 Stat. 828; Mar. 3, 1911, c. 231, section 128, 36 Stat. 1133; Jan. 28, 1915, c. 22, section 2, 38 Stat. 803; Feb. 7, 1925, c. 150, 43 Stat. 813; Feb. 13, 1925, c. 229, section 1, 43 Stat. 936.)

## JUDICIAL CODE, SECTION 128, AMENDMENTS SUBSEQUENT TO FEBRUARY 13, 1925.

(Judicial Code, section 128, amended.) Appellate jurisdiction.

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(b) *Review of interlocutory orders or decrees of district courts.* * * *

First. To review the interloctuory orders or decrees of the district courts, including the District Courts of Alaska, Hawaii, Virgin Islands, and Canal Zone, which are specified in Section 227 of this title. (As amended April 11, 1928, c. 354, Section 1, 45 Stat. 422.)

Second. To review decisions of the district courts, under section 159 of Title 45. (As amended May 20, 1926, c. 347, Section 13(a), 44 Stat. 587.)

Third. In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all civil cases wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1000; in all criminal cases, and in all habeas corpus proceedings; and in the District Court of the Canal Zone in the cases and modes prescribed in sections 61 and 62, title 7, Canal Zone Code (48 Stat. 1122). (As amended May 31, 1935, c. 160, 49 Stat. 313.)

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*Sec. 504. Appeals and writ of error, how taken.* Appeals and writs of error may be taken and prosecuted from the final judgments of the district court for the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: In prize causes and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars the United States circuit court of appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the district court.

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COMPILED LAWS OF ALASKA.

*C. L. A. 1933.*

*Sec. 4510. Next of kin to be guardian.* Whenever it becomes the duty of a commissioner to appoint a guardian for a minor, the relatives of such minor, whether male or female, upon application to the commissioner, shall in all cases be appointed, the nearest relative having precedence: provided, said applicant

shall be of good moral character and be otherwise competent to discharge the duties of guardian to such ward.

*C. L. A. 1933.*

*Sec. 4513. Powers and duties of guardian.* Every guardian so appointed shall have the custody and tuition of the minor and the care and management of his estate, and shall continue in office until the minor shall have arrived at the age of twenty-one years, or until the guardian shall have been discharged according to law: provided, however, the father of the minor, if living, and in case of his death the mother, while she remains unmarried, being themselves respectively competent to transact their own business, shall be entitled to the custody of the person of the minor and to the care of his education.

*C. L. A. 1933.*

*Sec. 4514. Bond of guardian.* Every such guardian shall give bond, with surety or sureties, to the United States, in such sum as the commissioner may order, with conditions as follows:

First. To make a true inventory of all the real estate, and of all goods, chattels, rights, and credits of the ward that shall come to his possession or knowledge, and to return the same to the commissioner at such time as the latter may order;

Second. To dispose of and manage all such estate and effects according to law and for the best interest of the ward, and faithfully to discharge his trust in

relation thereto, and in relation to the custody, education, and maintenance of the ward;

Third. To render, on oath, an account of the property in his hands, including the proceeds of all real estate sold by him, and of the management and disposition of all such property, within a year after his appointment, and at such other times as the commissioner shall direct;

Fourth. At the expiration of his trust, to settle his accounts with the commissioner or with the ward or his legal representatives, and to pay and deliver over all the estate and effects remaining in his hands, or due from him on such settlement, to the person or persons who shall be legally entitled thereto.

*C. L. A. 1933.*

*Sec. 4515. Testamentary guardian.* Every father may, by his last will in writing, appoint a guardian or guardians for any of his children, whether born at the time of making the will or afterwards, to continue during the minority of the child or for a less time. And every mother may, by her last will in writing, appoint a guardian or guardians for any of her children, to continue during the minority of the child or for a less time: provided, the father of such child or children is dead and has not appointed a guardian, or whenever, by judgment of divorce between such father and mother, the custody of such child or children has been awarded to the mother; and every such testamentary guardian shall have the same powers and per-

form the same duties with regard to the person and estate of the ward as a guardian appointed by the commissioner: provided, nothing in this section shall be construed to deprive either the surviving father or mother of the custody of the person of his or her children, such surviving parent being competent to transact his or her own business.

*C. L. A. 1933.*

*Sec. 4516. Bond of testamentary guardian.* Every such testamentary guardian shall give bond in like manner and with like conditions as is required of a guardian appointed by the commissioner: provided, when the testator in a will appointing the guardian shall have ordered or requested that such bond shall not be given, the bond shall not be required, unless from a change in the situation or circumstances of the guardian, or for other sufficient cause, the commissioner shall think proper to require it.